July 1, 2004

VIA ECFS AND E-MAIL

John A. Rogovin, General Counsel
Federal Communications Commission
445 12th Street SW
Room 8-C750
Washington, D.C. 20554

Re: USTA II Remand Proceedings: Interim Rule Authority
CC Docket Nos. 96-98 and 01-338

Dear Mr. Rogovin:

Association for Local Telecommunications Services ("ALTS"), CompTel/ASCENT, and The Pace Coalition, through their undersigned counsel, respectfully respond to the white paper submitted to the Commission by Michael Kellogg on behalf of the United States Telecom Association ("USTA") (the "ILEC White Paper"). As USTA acknowledges, there is no question that the Commission has the authority to adopt interim rules in this proceeding. In the ILEC White Paper, however, USTA argues that the Commission's authority to adopt interim rules is somehow linked to the breadth of the ILECs' commitment letters. To the contrary, as discussed in the attached White Paper, the Commission has broad authority to adopt interim rules in this proceeding, and the Commission may use that authority to preserve competition and stability in the marketplace while it considers all of the issues raised by the court's remand. In this letter, we briefly respond to certain statements made in the ILEC White Paper.

All parties agree that the Commission has the authority to adopt interim rules; at issue is the scope of the rules that the Commission may adopt. Although the ILECs would like the Commission to believe that it is significantly constrained in adopting interim rules, the relevant case law and the Commission's own precedent demonstrate that the Commission may adopt rules that are substantially similar to the unbundling rules that the Court vacated in *USTA II*. In *Mid-Tex Electric Cooperative v. FERC*, which the ILEC White Paper relies upon as authority for various propositions, the D.C. Circuit upheld an interim rule promulgated by the Federal Energy Regulatory Commission ("FERC") that did not change the substance of the previously vacated rule. *See Mid-Tex Electric Cooperative v. FERC*, 822 F.2d 1123 (D.C. Cir. 1987). Moreover, in *CompTel v. FCC*, the court affirmed that the avoidance of market disruption pending broader reform is a "standard and accepted justification for a temporary rule." *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002). There is simply no authority – and USTA does not cite to any – for the ILECs' extraordinary claim that the Commission's interim rule authority is limited to the scope of the ILECs' "voluntary

commitments." Contrary to USTA's claim, under the facts here, the mere adoption of interim rules that are similar to previously vacated rules – and certainty adoption of interim rules that go beyond the scope of the limited ILEC commitments – does not support the issuance of a writ of mandamus.

Further, the parties agree that the Commission's actions on remand should respond to the *USTA II* court's concerns. In the ILEC White Paper, however, the ILECs construct an untenable barrier to interim rules. Acknowledging the *Mid-Tex* precedent, the ILECs then offer a standard for interim rules that could be met in effect only by the adoption of permanent rules. In particular, USTA claims that for the Commission to adopt rules that are "reasonably calculated" to address the Court's concerns, the Commission must "at the very least" weigh alleged "market facts demonstrating that CLECs can and do compete in many classes of markets" without unbundling and must weigh cable telephony and special access, all in the name of an impairment analysis that promotes the ILECs' view of "genuine, facilities-based competition." *ILEC White Paper* at 2.[1] Tellingly, the ILECs do not cite record evidence of the alleged "market facts" to which they refer, nor do they indicate how the Commission possibly could weigh this evidence in the context of interim rules pending completion of an expedited remand proceeding. Rather, the level of detailed fact finding that USTA contemplates could only be performed in the context of developing final rules – adopted after notice and comment on the issues.

The Commission should not fall into the ILECs' trap. In adopting interim rules that are necessary to avoid market disruption, the agency is not required – nor is it practical or appropriate – to conduct the detailed fact-gathering and analysis that the ILECs claim are required. The Commission clearly confronts a market in grave turmoil. Thus, it is necessary and appropriate for the Commission to act on an interim basis to avoid market disruption that threatens consumers with price increases, the loss of service from carriers withdrawing from markets and general service problems. In a situation where the Commission also is acting expeditiously to collect the "market facts" necessary to adopt permanent rules, the Commission has broad discretion to adopt interim protections designed to maintain established business relationships and prevent disruption.

Finally, the ILECs suggest that the Commission may be impeded from acting because it did not act immediately after the *USTA II* decision was announced. *ILEC White Paper*

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[1] The ILECs' notion of facilities-based competition is itself skewed to a narrow construction inconsistent with the Act. As Chairman Powell testified shortly after the Commission adopted the *Triennial Review Order*, "[In discussing unbundling,] we are not talking about no use of the incumbent's network. Whether I believe that was a right or not, the statute would never permit me to do that." Testimony of Michael Powell, Chairman of the FCC, on *Health of the Telecommunications Sector: A perspective from the Commissioners of the FCC*, before the Subcommittee on Telecommunications and the Internet Committee on Energy and Commerce House of Representatives (Feb. 26, 2003).

at 4. This contention is flatly incorrect. The Court's mandate in *USTA II* did not go into effect until June 16, 2004, and almost up until that date, there was significant uncertainty as to whether the mandate would issue at all. The Commission also was actively engaged in facilitating the commercial negotiations that ultimately proved unsuccessful. In this context, the Commission has not delayed in creating interim rules, and it is well within its authority to adopt such rules at this time.

Sincerely,

/s/
John D. Windhausen, Jr.
President
Association for Local Telecommunications Services

/s/
H. Russell Frisby, Jr.
CEO
CompTel/ASCENT

/s/
Genevieve Morelli
Counsel
The PACE Coalition

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin
Christopher Libertelli
Scott Bergmann
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Marlene Dortch

Encl.

ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMPTEL/ASCENT, AND THE PACE COALITION LEGAL BASIS FOR INTERIM RULES

As all parties in this proceeding have recognized, including the Commission and the incumbent local exchange carriers ("ILECs"), the Commission has the authority to adopt interim rules to replace the rules adopted in the *Triennial Review Order*[1] that were vacated by the D.C. Circuit in *USTA II* until the Commission adopts permanent rules on remand.[2] The Commission previously has exercised its authority to adopt interim rules in similar circumstances.[3] Courts have upheld interim rules promulgated by the Commission as well as other federal agencies,[4] including rules that were substantially similar to the previously vacated rules.[5] Furthermore, in accordance with the Administrative Procedure Act ("APA"), the

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1 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (Triennial Review Order), corrected by *Errata*, 18 FCC Rcd 19020 (2003), *appealed sub. nom, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir. 2004) ("*USTA II*").

2 *See, e.g., USTA v. FCC*, Case No. 00-1012, Reply of the Federal Communications Commission to Opposition of the ILEC Petitioners to Motion to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, at 8-9 (June 3, 2004); Joint Opposition of ILECs to Motions to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, at 11 (June 1, 2004) (acknowledging that the "FCC has wide discretion to adopt *interim* rules...").

3 *See Bell Operating Companies' Joint Petition for Wavier of Computer II Rules,* Memorandum Opinion and Order, 10 FCC Rcd 1724 ¶ 25 (1995) (upholding agency's authority to adopt interim measures to "prevent industry disruption after agency rules have been vacated"); *see also Accounting for Judgments and Other Costs Associated with Litigation*, Report and Order, 12 FCC Rcd 5112 ¶ 60 (1997) (adopting "a neutral remedy" deferring costs of litigation pending resolution of the rulemaking process); *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) (upholding temporary rules that the Commission created to avoid market disruption).

4 *See, e.g., Mid-Tex Electric Cooperative v. FERC*, 822 F.2d 1123 (D.C. Cir 1987) (upholding interim rules that were in large part identical to the previously vacated rules); *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153 (D.C. Cir. 1981) (upholding interim rules promulgated by the Secretary of Agriculture without notice and comment).

5 *See Mid-Tex Electric Cooperative v. FERC*, 822 F.2d at 1123.

Commission may adopt interim rules without advance notice and comment, because good cause exists.

The Commission's authority to adopt interim rules in this case is derived, at a minimum, from (1) the court's mandate, which directed the Commission to adopt rules consistent with the court's order, (2) the unbundling requirements set forth in section 251 of the Act, (3) the Commission's related authority to take all actions necessary under section 4(i) of the Act, and (4) the Commission's authority to conduct proceedings in such a manner "as will best conduce to proper dispatch of business and to the ends of justice,"[6] as permitted by section 4(j) of the Act. In addition, the requirement pursuant to section 271 that the Bell Operating Companies ("BOCs") unbundle loops, transport and switching provides independent authority for the Commission to adopt interim protections in this instance.

It is essential that the Commission adopt interim rules at this time to provide certainty in the marketplace and to ensure continued uninterrupted service to consumers. ILECs have taken the position that, as of June 16, 2004, the effective date of the D.C. Circuit's vacatur of portions of the *Triennial Review Order*, there are no valid obligations requiring ILECs to make available switching, high-capacity loops and dedicated transport as unbundled network elements at TELRIC rates. The ILECs take this position despite the fact that section 251(c)(3) of the Act has not been vacated, and the court, in vacating the FCC's nationwide findings with respect to dedicated transport and unbundled switching did not dispute the proposition that impairment would exist in at least the majority of instances nationwide. Moreover, the court did not disturb the FCC's impairment finding with regard to high-capacity loops, rendering the ILECs' position with respect to high capacity loops untenable. The court also did not vacate the

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6 47 U.S.C. § 154(j).

Commission's impairment standard;[7] rather, the court vacated the Commission's subdelegation of authority to the states. The absence of interim rules would leave the industry in limbo and threatens consumers with price increases, the withdrawal of services in many markets, and other disruptions of service.

In adopting interim rules, the Commission may consider and adopt rules that are substantially similar to the previously vacated rules. In *Mid-Tex*, the D.C. Circuit evaluated an interim rule that the Federal Energy Regulatory Commission ("FERC") had promulgated in response to a prior court decision vacating its previous rules. FERC had adopted a rule allowing utilities to include a portion of their construction work-in-progress ("CWIP") costs in their rate base. The D.C. Circuit vacated and remanded the CWIP issue to FERC for further consideration.[8] On remand, FERC promulgated an interim rule that *did not change* "'the substance of the general provisions of the [vacated] CWIP rule.'"[9] FERC, however, attempted to respond to the Court's concerns that led to the vacatur of the prior rule by including safeguards in the interim rules.[10] The Court upheld FERC's interim rule despite the fact that it was substantially similar to the vacated rule. In doing so, the Court emphasized that FERC had taken

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7 *See USTA II*, 359 F.3d at 571-72.

8 *See Mid-Tex Electric Cooperative, Inc. v. FERC,* 773 F.2d 327 (D.C. Cir. 1985).

9 *Mid-Tex Electric Cooperative v. FERC*, 822 F.2d at 1124 (quoting Order No. 448, Construction Work in Progress – Anticompetitive Implications; Interim Rule and Request for Comment, 51 Fed.Reg. 7774, 7775 (March 6, 1986)).

10 For example, FERC indicated that it "would exercise its suspension powers and provide preliminary relief where a wholesale customer can make a 'concrete, substantial showing that it is likely to incur imminent, irreparable harm if CWIP is allowed.'" *Id.* at 1131 (holding that "FERC has put into place safeguards adequate, at least on their face, to protect customers against the kinds of injuries its CWIP policy may cause...").

steps to prevent the potential harms that the Court had found in the previous rule by employing such safeguards.[11]

Courts consistently have interpreted the *Mid-Tex* rule to permit interim rules pending action on remand so long as the agency makes some attempt to respond to the Court's concerns, even if interim rules do not correct each of the errors prompting the Court's remand. In particular, subsequent courts have recognized that the avoidance of market disruption pending the adoption of broader reforms is "a standard and accepted justification for a temporary rule."[12] If the Commission believes that it is necessary or appropriate, then, like FERC, it may allow the ILECs to petition for a waiver that provides relief from the interim rules where there is clear evidence that conditions in a specific market vary decisively from those in a typical market.[13]

Opponents of interim rules have suggested that the D.C. Circuit's decision in *International Ladies' Garment Workers' Union v. Donovan*[14] bars the FCC from adopting rules that are substantially similar to the vacated rules. That is incorrect. As an initial matter, in *ILGWU*, the issue before the court was whether a district court had jurisdiction to interpret and enforce a mandate from the court of appeals. The court's statements concerning the substance of the *agency's* actions were thus dicta, and the court explicitly recognized that there may be "facts that do not appear in the record before us."[15] In addition, the factual circumstances in *ILGWU*

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11 *Mid-Tex v. FERC*, 822 F.2d at 1131 (holding that "FERC has put into place safeguards adequate, at least on their face, to protect customers against the kind of injuries its CWIP policy may cause...") (citations omitted).

12 *Competitive Telecommunications Ass'n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002); *see Analysas Corp. v. Bowles*, 827 F.Supp. 20, 23 (D.C. Cir. 1993) (interpreting *Mid-Tex* to permit interim rules where, *inter alia*, rules were of short duration, agency was "quickly moving to promulgate a permanent rule" and rules were "necessary in the specific factual circumstance presented").

13 *See USTA II*, 359 F.3d at 570.

14 733 F.2d 920 (D.C.Cir. 1984) ("*ILGWU*").

15 *Id.* at 923.

are distinct from the present case. In that case, the remanding court issued specific instructions to the Secretary of Labor to rescind a particular revision to a rule.[16] In this case, there is no comparable instruction that the Commission eliminate its unbundling rules; to the contrary, although the court faulted the Commission for not considering particular alternatives when conducting the impairment finding, the court did not tell the Commission that it must find non-impairment for all high-capacity loops and transport, or mass market switching.[17] In addition, the court decided *ILGWU* before *Mid-Tex*, which specifically approved interim rules in circumstances analogous to the facts presented in this case. Thus, *ILGWU* carries little to no precedential weight.

The court's decision in *Radio-Television News Directors Association* also does not bar the Commission from adopting interim rules.[18] In fact, that case did not even address the scope of an agency's discretion to act to establish interim rules in the wake of a remand. Instead, it involved an agency's *refusal* to act in the face of repeated and express judicial deadlines. *Radio-Television* involved a longstanding challenge to the Commission's political editorial and personal attack rules. When the Commission failed to act for more than ten years on multiple petitions for rulemaking to repeal those rules, interested parties filed mandamus petitions urging the court of appeals to direct the Commission to repeal the rules. The court denied the petition "without prejudice to its renewal" should the Commission "fail to make significant progress,

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16 *Id.* at 920 (citing 722 F.2d 795, 828).

17 *See, e.g., USTA II* at 570 (stating "[t]he record on the matter is mixed, perhaps sufficiently so that the Commission's 'provisional' assumption to the contrary might be sustainable as an absolute finding").

18 *See Radio-Television News Directors Association v. FCC*, 229 F.3d 269 (D.C. Cir. 2000) ("*Radio-Television II*").

within the next six months."[19] When the Commission deadlocked in voting the issue six months later, the court of appeals denied a second petition for mandamus, but held that the notice announcing the deadlock was final agency action. In the ensuing appeal, decided in 1999, the court of appeals reversed and remanded, directing the Commission "[g]iven its prior delay," to "act expeditiously" on remand to justify or repeal the rules (which the court did not vacate). When nearly a near later the Commission had failed even to *commence* a proceeding on remand (and in response to an emergency motion to enforce the mandate had attempted to evade review by "suspending" its rules for sixty days), the court of appeals finally vacated the permanent rule, noting that "[w]hile it acknowledged the need for a prompt decision," the "Commission has delayed final action for two decades." Even then, the court acknowledged that the Commission could have maintained the same rules, "with or without new data" if the Commission submitted supporting justification."[20] *Radio-Television* is not remotely on point. The Commission is not here constrained by similar timeframes or dilatory tactics and, instead, is acting promptly to respond to the court's concerns.

Although the Commission may adopt rules that are substantially similar to the previously vacated rules, the agency may not prejudge the remand proceeding by adopting rules that purport to resolve the remand questions. To do so would call into question whether the Commission is adopting new rules altogether, which must be subject to notice and comment.[21] For example, the Commission cannot apply rate increases that take effect in the absence of the Commission's completion of its impairment findings. Doing so would imply a finding of non-

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19 *Radio-Television News Directors Association, et al. v.* FCC, 184 F.3d 872, 878 (D.C. Cir. 1999).

20 *Radio-Television II*, 229 F.3d at 271.

21 *See American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d at 1153 (agency authority to adopt interim rules did not justify agency adoption of final rules without notice and comment).

impairment without the Commission having conducting the requisite fact-finding and corresponding analysis. Furthermore, although the Commission should take into account the court's concerns when adopting interim rules, the Commission is not required – nor is it appropriate – as USTA has suggested, to weigh all market facts regarding CLEC competition, as well as cable telephony and special access, as part of its impairment analysis for interim rules. This level of detailed fact-finding only could be performed in the context of developing final rules, which must adopted after notice and comment on all issues.

It is not too late for the Commission to adopt interim rules; the Court's mandate did not take effect until June 16, 2004, and the Commission still may move quickly to adopt interim rules.